

**STATE OF MINNESOTA
MINNESOTA ENVIRONMENTAL QUALITY BOARD**

**In The Matter of
the City of Hutchinson
(Hutchinson Utilities Commission)
Natural Gas Pipeline Project**

**FINDINGS OF FACT,
CONCLUSIONS AND
ORDER SUSPENDING PERMIT
AND AUTHORIZING LITIGATION**

The above-entitled matter came before the Minnesota Environmental Quality Board at a regular monthly meeting on December 18, 2003

STATEMENT OF ISSUE

The issue before the Board is what action to take to respond to violations of the Amended Pipeline Routing Permit for Natural Gas Pipeline the EQB issued to the Hutchinson Utilities Commission on March 20, 2003, which included an Agricultural Impact Mitigation Plan, which was made an enforceable part of the Permit and agreed to by HUC.

Based upon the information in the record and files of the EQB, the EQB makes the following Findings of Fact, Conclusions and Order:

FINDINGS OF FACT

The Pipeline Routing Permit

1. In December 2002, the EQB issued a Pipeline Routing Permit to the City of Hutchinson (Hutchinson Utilities Commission) for a 90-mile long natural gas pipeline from the City of Trimont in Martin County to the City of Hutchinson in McLeod County.
2. In March 2003, the EQB amended the permit to more specifically identify the route and to incorporate an Agricultural Impact Mitigation Plan (Mitigation Plan) as an enforceable

part of the Permit. The Permit requires HUC to comply with certain construction practices described in the Mitigation Plan. HUC agreed to comply with the requirements of the Mitigation Plan.

3. Minn. Stat. § 116I.015, subd. 3(b)(9) requires the EQB to adopt rules requiring a person who has constructed a pipeline to restore the area affected, to the extent possible, to the natural conditions that existed immediately before construction of the pipeline. The EQB has adopted such a rule. Minn. Rules part 4415.0195, item N. The Permit contains such a requirement as one of the conditions. Condition VII.B.17. The Mitigation Plan was intended to establish specific practices the permittee would follow to help ensure that the land was restored to its natural condition to the extent possible.

Agricultural Impact Mitigation Plan

4. Paragraph 2 of the Mitigation Plan establishes procedures for removal, storage, and replacement of soil intended to minimize the mixing of topsoil with subsoil. In particular, paragraph 2 of the Mitigation Plan establishes the requirement for HUC to employ a qualified soil scientist to determine the amount of topsoil to be stripped and to set stakes or flags in the right-of-way to clearly identify the depth of soil to be removed. The Mitigation Plan specifies that at least 8 inches of soil must be stripped but that HUC need not strip more than 14 inches. Paragraph 2 also contains requirements regarding separate storage of subsoil and topsoil, the replacement of subsoil in the trench and disposal of excess subsoil, and the replacement of topsoil.
5. Paragraph 3.D.1. of the Mitigation Plan establishes the requirement for the support pipe to be used in repairing tile lines damaged or severed by the pipeline trench. The Mitigation Plan states, “Where tile lines are severed by the pipeline trench, three-sided

steel channel iron, angle iron, full-round slotted pipe or half pipe, or an equivalent material, will be used to support the repaired tile lines.”

6. Paragraph 5 established requirements for removal of rocks that are unearthed during digging of the trench. The Mitigation Plan requires HUC to remove all rocks that are larger than 3 inches in diameter.
7. Paragraph 7 sets forth requirements to alleviate compaction of the soil. The Plan requires HUC to consult with the county Soil and Water Conservation Districts and implement SWCD recommendations for alleviating soil compaction.
8. Other provisions of the Mitigation Plan address land leveling, soil erosion, temporary roads, and other construction practices, all designed to minimize the impact of construction on the land and the landowner.
9. The requirements of the Mitigation Plan were intended to minimize the impacts of the pipeline on the land and to restore the land to its natural condition to the extent possible.

Complaints

10. Construction of the pipeline began on or about July 14, 2003. Shortly after construction started, the EQB began receiving complaints about the manner in which HUC was proceeding with construction of the pipeline. These complaints related primarily to stripping of topsoil and lack of notice to landowners.
11. On July 22, 2004, Kevin Johnson, an attorney representing a group of landowners called Sib-Ren FAIR, wrote to EQB Chair Robert Schroeder and stated that HUC was not complying with the Mitigation Plan in Martin County and requested that EQB take immediate action to require compliance, including suspension of the permit if necessary to assure compliance.

12. Alan Mitchell of the EQB staff and Bob Patton of the Department of Agriculture staff arranged meetings with HUC representatives, landowners, and county officials in August. One meeting was held in St. James on August 7 and another was held in New Ulm on August 14. At these meetings Mr. Mitchell and Mr. Patton discussed the obligations of HUC under the Mitigation Plan.
13. At the meeting in St. James on August 7, Mr. Mitchell and Mr. Patton were informed by the soil scientist hired by HUC that he had developed an alternative procedure, rather than the one described in the Mitigation Plan, for determining the amount of topsoil to be stripped on each parcel of land crossed by the pipeline. The soil scientist had submitted his procedure to HUC representatives, but HUC never submitted the procedure to EQB.
14. Also on August 7, Mr. Mitchell and Mr. Patton inspected several of the parcels on which topsoil had been stripped in Martin and Watonwan Counties, including the Jon Oanes property in Martin County. HUC's soil scientist accompanied Mr. Mitchell and Mr. Patton on these inspections, and he took several soil borings on each of the parcels inspected. In each case, the soil boring indicated that some topsoil remained along the right-of-way and that the topsoil had not been stripped to the depth required under the Mitigation Plan. Mr. Mitchell and Mr. Patton were informed by the soil scientist that, to date, the stripping of the topsoil had been conducted according to the alternative procedure.
15. On August 26, 2003, EQB Chair Schroeder wrote to HUC and expressed concern about HUC's performance with the terms of the permit and the Mitigation Plan and described certain changes in HUC's construction practices that must be implemented to assure compliance. The Chair stated in the letter that failure to proceed in compliance with the

Mitigation Plan could require the EQB to hold a special meeting to consider possible actions and sanctions.

16. On September 16, 2003, Patrick Spethman, the Interim General Manager of the Hutchinson Utilities Commission, wrote to the Chair in response to his August 26 letter and described how HUC was addressing the concerns raised by the Chair.
17. During much of August, September, and October, Mr. Mitchell and Mr. Patton remained in almost daily contact with Mr. Spethman. Mr. Mitchell and Mr. Patton advised Mr. Spethman of complaints and concerns that were reported to them by various landowners and others about construction of the pipeline. Mr. Spethman would report back to either Mr. Mitchell or Mr. Patton.
18. The EQB received a number of complaints from landowners who were upset about the manner in which HUC land agents and other representatives treated them with regard to the precise route of the pipeline. Some landowners stated that HUC representatives told them that HUC would accommodate their requests only if the landowner signed an easement and that if they did not sign, HUC would put the pipeline where it wanted.

Drain Tile Violations

19. In October 2003, the EQB received complaints about the manner in which HUC was repairing drain tile that was cut during construction. The complaints related to the allegation that HUC was using a full-round unslotted pipe as a support material over the pipeline rather than a full-round slotted pipe or other specified material called for in the Mitigation Plan.

20. HUC did not at any time inform the EQB that it was using a full-round unslotted pipe for the tile repair, and the EQB did not know about this decision until early in October when landowners began complaining.
21. On October 8, 2003, Kevin Johnson, the Sib-Ren FAIR attorney, wrote to the Chair regarding the tile repair issue and again requested that the EQB take immediate action to address the situation.
22. During its regular monthly meeting on October 16, 2003, the EQB Board heard a report on the pipeline construction from EQB staff. Counsel for Hutchinson Utilities Commission, counsel for Sib-Ren FAIR, and a couple of the landowners on the pipeline route also addressed the Board. HUC reported on its activities and on the status of construction. The landowners described certain practices that the landowners alleged were not in compliance with the Mitigation Plan.
23. HUC has admitted that it used full-round unslotted pipe to repair the cut drain tile up to the Bastian property and asserted that north of the Bastian property HUC drilled holes in the unslotted pipe before placing the pipe in the ground. It is unknown how many holes HUC drilled in the unslotted pipe used north of the Bastian property. At some parcels, HUC cut rectangular slots in the pipe.
24. The Mitigation Plan also requires that the support pipe must be of sufficient strength to support loads expected from normal farming practices (up to a 10 ton point load) on the surface directly above the tile line. HUC has not provided the EQB with any documentation on the capability of the support pipe to meet this requirement.

Stipulation Agreement

25. On October 28, 2003, the EQB held a special Board meeting to consider the matter of the failure of HUC to use the appropriate support pipe in repair of the drain tile. The Board approved a Stipulation Agreement with HUC regarding the drain tile issue. The Stipulation Agreement was executed by the Chair on October 31, 2003.
26. HUC was unwilling to commit as part of the Stipulation Agreement on drain tile repair to compensate farmers for future crop losses. The EQB staff agreed to drop such a provision, but the Stipulation Agreement does recognize in Part 10 that the EQB might conduct an investigation into other construction practices by HUC and that the EQB might seek additional sanctions and remedies for other violations and that the EQB would charge HUC with the costs of such investigation. At the October 28 meeting, the Board directed the EQB staff to conduct such an investigation.

EQB Investigation

27. On November 3, 2003, Alan Mitchell, Dave Birkholz, and Bill Storm of the EQB staff and Bob Patton of the Department of Agriculture traveled to New Ulm to meet with HUC representatives. Mr. Mitchell and Mr. Birkholz interviewed a number of the inspectors who worked on construction of the pipeline. Mr. Patton and Mr. Storm inspected two parcels of land in Sibley County. They found that topsoil and subsoil had been mixed on the parcels they inspected and that clods of clay were on the surface.
28. On November 7, 2003, Alan Mitchell wrote to Patrick Spethman and requested, under the Data Practices Act, Minn. Stat. ch. 13, that HUC provide copies of a number of documents, including the notes that each of the construction inspectors had said in their interview they maintained, notes of the soil scientists, and the report on an alternative soil

- stripping method that had been prepared by HUC's soil scientist. On November 18, the attorney for HUC informed EQB staff that HUC was reluctant to provide the requested documents because they might end up in the hands of the Sib-Ren FAIR attorney.
29. Mr. Mitchell also requested in his November 7 letter that HUC submit a check for \$25,000 to cover ongoing estimated costs of the investigation. As of December 11, HUC had not submitted any portion of the requested \$25,000 to cover EQB costs, and the EQB is presently running a deficit of more than \$8,000 in the Hutchinson account.
30. On November 12, 2003, Alan Mitchell, Bob Patton and George Johnson, a soil scientist with the EQB staff, conducted an inspection of ten parcels along the pipeline. They found that topsoil and subsoil had been mixed on the parcels they inspected, that large clods of clay were present on the surface on some parcels, that large rocks were found in the right-of-way, and that the soil was compacted.
31. On November 20, 2003, at the monthly meeting of the EQB, Alan Mitchell and Bob Patton advised the Board of the status of their investigation and about the violations that had been observed. The Board asked the staff to bring a recommendation to the Board in December for action by the EQB. HUC's attorney was present at the Board meeting.
32. The staff arranged an inspection for EQB members Gene Hugoson (Commissioner of the Department of Agriculture), Bruce Bomier (citizen member), and Mary Mellen (citizen member), along with certain staff of other agencies, for December 5, 2003. The Hutchinson Utilities Commission members were invited to participate in the inspection, and they had indicated an intent to do so. Due to inclement weather, the inspection was cancelled. Member Bomier was able to meet with landowners Gary Sturm (the mayor of

St. James, Minnesota) and Mark Klinkner and inspect two parcels in Watonwan County on December 4.

33. On December 1, 2003, Alan Mitchell wrote to Patrick Spethman and requested that a number of documents be provided to the EQB. Again, this request was made in accordance with the Data Practices Act. Also, Mr. Mitchell asked HUC to answer a number of questions about various aspects of the pipeline and HUC's construction practices.
34. On December 10, 2003, Bruce Hanson, counsel for HUC, wrote to Michael Sullivan and requested that the consideration of the suspension of the HUC permit be postponed until the January Board meeting.
35. As of December 11, 2003, HUC has not replied in writing to the requests made in the November 7 and December 1 letters from Mr. Mitchell. No documents and no information have been submitted, nor has HUC identified any reason for not providing the documents and information.

Status of Pipeline Construction

36. The EQB has been asking HUC since at least November 7 to advise the EQB of the status of the pipeline construction and when HUC expects to begin transporting natural gas in the pipeline. As of December 11, HUC had not advised the EQB in writing of its anticipated schedule.
37. The EQB has been asking HUC for several weeks to provide the EQB with an updated version of the project checklist that HUC had begun maintaining at EQB request in late August. The latest version in the possession of the EQB was provided on October 16, 2003. It is unknown to the EQB at this time whether construction is complete.

38. The EQB has also asked HUC to provide information regarding the manner in which HUC is obtaining and will obtain natural gas during the time the pipeline is not in operation. HUC has not provided any documentation in response.
39. On December 1, the EQB learned for the first time that HUC intended to cut a tap into the pipeline at approximately milepost 60 to connect the pipeline with a separate pipeline that runs from Fairfax on the west to Winthrop on the east. This tap is intended to supply a portion of New Ulm's gas allotment to the city of Fairfax. There is nothing in the permit application, in the permit, or in any other documentation that addresses this tap or authorizes this tap. Neither HUC nor the city of New Ulm has authorization from the EQB or from the landowner to construct this tap.

Other Violations

40. HUC violated the requirement of the Mitigation Plan to have a qualified soil scientist set stakes or flags identifying the amount of topsoil to be stripped for all parcels in Martin County and for several parcels in the southern end of Watonwan County. HUC has admitted that it did not have a qualified soil scientist stake these parcels. HUC has failed to provide the logs maintained by the soil scientists recording efforts to stake the appropriate amount of topsoil to strip in other parcels along the pipeline route. It is unknown how many parcels were actually staked by a qualified soil scientist and how much topsoil was stripped from any particular parcel.
41. During site visits on November 3 and November 12, EQB staff found mixed topsoil and subsoil. Soil borings were taken at paired locations inside the right-of-way and outside the right-of-way. In all soil boring locations, borings taken outside the right-of-way indicated natural topsoil depths reached at least 14 inches. HUC has failed to provide

information explaining how the mixing of topsoil and subsoil occurred and has not produced the records requested.

42. The EQB staff observed large clods of clay on the surface on the right-of-way on the Westman and Garland parcels in Watonwan County. On all the parcels the EQB staff investigated, the staff has found that clay has been mixed with topsoil along the right-of-way. Clay should not occur on the surface nor be mixed with the topsoil.
43. Large rocks were observed by staff on the Ball, Schauer, Koenig, Thordson, Mayer, and Westman properties. Complaints about rocks have been registered with the EQB from other landowners. HUC has failed to remove rocks larger than 3 inches in diameter from a number of parcels along the route. The number and location of those parcels where rocks have not been removed has not been determined, and HUC has failed to provide any information to the EQB on its efforts to remove large rocks from the right-of-way.
44. It is uncertain what contacts HUC made with the county Soil and Water Conservation Districts and whether HUC obtained recommendations on how to alleviate compaction of the soil once the soil was replaced. It is also uncertain what HUC did to alleviate compaction on individual parcels of land, and whether HUC followed any recommendations of the SWCD. HUC has not provided the EQB with information the EQB has requested relating to this issue. Complaints about HUC's failure to properly address soil compaction of both subsoil and topsoil have been registered with the EQB for a number of parcels along the pipeline.
45. Three of the landowners have hired their own consultants to evaluate the soil on their property along the right-of-way. These landowners are Peter Kalenberg, Arnie Koenig, and Jon Oanes. In each case the consultant reported that soil displacement and

replacement was done very poorly and that soil fertility levels have diminished along the pipeline right-of-way.

46. Some landowners have expressed satisfaction with the work that HUC did in installing the pipeline. County inspectors have reported that they observed satisfactory work in their counties.
47. On a number of parcels along the pipeline, HUC has failed to restore the land, to the extent possible, to the condition it was in prior to construction of the pipeline, in violation of the permit and the EQB rule and its own commitments. The number and location of parcels on which topsoil and subsoil have been mixed, and compaction has not been alleviated, and rocks have not been removed, cannot be determined without an onsite investigation of each parcel. The EQB has estimated that it would cost in excess of \$50,000 to conduct an investigation of the approximately 250 parcels along the 90 miles of pipeline between Trimont and Hutchinson.

EQB Authority

48. The EQB has authority to enforce its pipeline routing permits. Minn. Stat. § 116C.04, subd. 10, authorizes the EQB to enter into and enforce stipulation agreements to enforce its authorities. Minn. R. 4415.0205 authorizes the EQB to modify or suspend a permit under appropriate circumstances.
49. Pursuant to Minn. R. part 4415.0205, subp. 3, the EQB may suspend a pipeline routing permit. The rule provides that a suspension must be limited to the following:
 - A. the route segment that includes the right-of-way preparation, pipeline construction, or restoration activities giving rise to the violation of the permit;
 - B. requiring corrective or ameliorative measures necessary for the pipeline to comply with the pipeline routing permit; and

C. the time period necessary for the permittee to complete the required corrective or ameliorative measures.

50. EQB rules require a permittee to be given ten days notice of alleged violations of a pipeline permit. Minn. Rules part 4415.0215, subp. 1. Hutchinson Utilities Commission has been aware for a number of weeks that the Environmental Quality Board has knowledge of alleged permit violations. The Chair was asked in Mr. Johnson's letter of July 22 to suspend the permit based on violations alleged in the letter. The matter was raised at the October 28 special Board meeting, and staff has raised this topic with HUC representatives at various meetings, including during negotiations of the Stipulation Agreement regarding the drain tile repair. At the November 20 Board meeting, the staff reported on the violations that had been observed and the complaints that had been filed. Counsel for HUC was present at the November 20 meeting. The Board directed the staff to bring a recommendation to the Board at the next meeting in December.
51. On December 8, 2003, HUC's attorney was advised that this matter would be on the December 18 agenda and that the staff was considering asking the Board to suspend the permit. On December 9, 2003, HUC was advised both orally and electronically by e-mail that the EQB staff would recommend to the Board that the permit be suspended based on the permit violations staff had identified. HUC has had more than ten days to respond to the violations that have led to the Board's consideration of the suspension of the permit.
52. Minn. R. part 4415.0205 also provides, "However, the chair may determine that circumstances exist requiring immediate board action," thus allowing the meeting to be held less than ten days after notification. The Chair and the Board find that HUC has had ample opportunity to respond to all the violations that have been alleged, that it was given ten days notice of the staff's intended recommendation, that construction of the pipeline

is nearly complete and that postponement of the decision for a month will allow HUC to complete construction, that certain persons with information about the pipeline construction may leave the area once the pipeline is complete, and that the next regular meeting of the Board is scheduled for January 15, 2004.

53. While it may be possible to remove large rocks and to alleviate compaction, and to even haul in topsoil, it would be difficult and expensive to attempt to restore the land to its natural condition at this point. It is simply not feasible to restore the land to its natural condition if topsoil and subsoil have been mixed. It is reasonable to require HUC to pay for any future crop losses that are incurred by farmers along the right-of-way. If HUC has complied with the requirements of the Mitigation Plan on certain parcels, presumably the future crop losses will be less on those parcels.

Based on the Findings of Fact, the Environmental Quality Board hereby makes the following

CONCLUSIONS

1. The EQB has authority to issue an Order suspending a pipeline routing permit under Minnesota Statutes chapter 116I and Minnesota Rules part 4415.0205.
2. Hutchinson Utilities Commission has been given more than ten days to respond to the violations of the Agricultural Impact Mitigation Plan that have been alleged and to provide the documentation and information requested by the EQB in its letters of November 7 and December 1 and was given notice on December 8, 2003, that the staff was considering requesting the EQB to suspend the permit at its meeting on December 18. On December 9, 2003, HUC was advised orally and by e-mail that the staff would recommend suspension.

3. The fact that HUC has had ample opportunity to respond to the alleged violations, to conduct itself in accordance with the Agricultural Impact Mitigation Plan, and to provide the information requested, and the fact that construction of the pipeline is nearly complete and persons with knowledge about the construction may leave the area soon, justify EQB action at this time.
4. Hutchinson Utilities Commission has violated various requirements of the permit and the Agricultural Impact Mitigation Plan on parcels along the entire pipeline, including requirements to remove large rocks, to alleviate compaction, to strip topsoil, and to restore the land to the extent possible to its natural condition that existed before the pipeline construction. The number and location of all parcels on which HUC failed to comply with the requirements of the Mitigation Plan is unknown at this time and some of the information that would aid in determining precisely which parcels have not been properly restored is in the hands of HUC, and HUC has refused to provide the information requested by the EQB.
5. Hutchinson Utilities Commission can minimize any financial losses it may incur if the permit is suspended by quickly providing the requested information, making the necessary payment, and committing to pay for future crop losses incurred by the farmers along the pipeline.
6. Any findings that might properly be termed conclusions and any conclusions that might properly be termed findings are hereby adopted as such.

ORDER

Based on the Findings of Fact and the Conclusions contained herein and on the entire record regarding the Hutchinson Pipeline Project, the Minnesota Environmental Quality Board hereby issues the following Order, effective immediately and until the corrective actions set out herein are completed:

1. The Amended Pipeline Routing Permit (EQB Docket No. 02-33-PRP-HUC) issued on March 20, 2003, is hereby suspended for the entire length of the pipeline until further order of the EQB.

2. Hutchinson Utilities Commission shall provide the documents and information requested in the EQB letters of November 7 and December 1, 2003.

3. Hutchinson Utilities Commission shall pay to the EQB the sum of \$25,000 for past and future expenses incurred by the EQB in the administration and investigation of this matter. Such payment shall not preclude the EQB from requesting additional payments from HUC if expenses exceed the amount paid.

4. Hutchinson Utilities Commission shall enter into a Stipulation Agreement acceptable to the EQB that includes a commitment by HUC to pay for actual future crop losses incurred by any landowner along the entire 90 miles of pipeline.

5. This Order shall be revoked and the Amended Permit placed back into effect upon a determination by the EQB that HUC has complied with the requirements of paragraphs 2, 3, and 4 of this Order.

6. Hutchinson Utilities Commission may request the EQB to revoke this Order at any time after HUC has complied with its terms.

7. The Chair of the Environmental Quality Board is hereby authorized to commence litigation against Hutchinson Utilities Commission and any other appropriate defendant if the Chair shall determine that reasonable progress in addressing the conditions attached to the suspension of the Order is not being made, and to seek a court order imposing sanctions for the violations that are established.

Approved and adopted this 18th day of December 2003.

**STATE OF MINNESOTA
ENVIRONMENTAL QUALITY BOARD**

Robert A. Schroeder, Chair